

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUDOLPH JEROME HORTON,

Defendant-Appellant.

---

UNPUBLISHED

August 28, 2007

No. 268264

Kent Circuit Court

LC No. 04-009942-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of first-degree murder, MCL 750.316(1), for which he was sentenced to life imprisonment. We reverse.

I

Defendant first argues that the trial court erred in denying his motion to suppress trace evidence. Specifically, defendant contends that the search warrants issued in this case were deficient and that the police therefore lacked the proper authority to search his apartment. We disagree. We review for clear error a trial court's findings of fact following a suppression hearing, but review de novo the trial court's ultimate decision on a motion to suppress. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

“Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings.” *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). To demonstrate Fourth Amendment compliance, the police must have a warrant or the search or seizure must fall within one of the narrow, specific exceptions to the warrant requirement. *Id.* To be valid, a search must typically be conducted pursuant to a warrant based on probable cause. *Id.* at 417. “Probable cause exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *Id.* at 417-418 (citation omitted). An overly general warrant may not serve as the basis for a search. *People v Toodle*, 155 Mich App 539, 548; 400 NW2d 670 (1986).

A search warrant must particularly describe the place to be searched and the persons or things to be seized. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.654(1). If a search warrant is not valid because it lacked probable cause or it was technically defective in some other manner, then any evidence seized pursuant to that warrant is typically inadmissible pursuant to

the exclusionary rule. *People v Hellstrom*, 264 Mich App 187, 193; 690 NW2d 293 (2004). However, Michigan courts recognize certain exceptions to the exclusionary rule, including the independent source exception, the attenuation exception, the inevitable discovery exception, and the “good-faith” exception. *Id.* at 193 n 3; *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004).

The trial court properly concluded that the search warrants issued in this case were defective. However, relying on the inevitable discovery exception to the exclusionary rule, the court denied defendant’s motion to suppress the trace evidence seized from his apartment. We perceive no error in the trial court’s ruling on this issue.

The inevitable discovery rule provides that evidence obtained through an unconstitutional search may “still be admitted at trial if the prosecution establishe[s] by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.” *People v Brzezinski*, 243 Mich App 431, 435; 622 NW2d 528 (2000), see also *Nix v Williams*, 467 US 431, 444; 104 S Ct 2501; 81 L Ed 2d 377 (1984). “If the evidence would have been inevitably obtained, then there is no rational basis for excluding the evidence from the jury.” *Brzezinski*, *supra* at 435-436; see also *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999).

“[T]here are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?” [*Id.* at 638, quoting *United States v Silvestri*, 787 F2d 736, 744 (CA 1, 1986).]

The police conducted their search of defendant’s apartment on October 22, 2003. The evidence presented at the suppression hearing in this case established that defendant still occupied his apartment on that date and that the warrants purportedly authorizing the search were defective. However, the evidence also showed that defendant vacated his apartment at the end of October, that defendant’s landlord regained possession of the apartment on November 1, and that the landlord would have freely granted the police permission to search the apartment at that time.

This evidence established that the trace material found in defendant’s apartment would have been discovered through independent, lawful means. *Brzezinski*, *supra* at 435; *Stevens*, *supra* at 638. The trial court did not clearly err in concluding that the police would have inevitably discovered the challenged evidence. *Frohriep*, *supra* at 702. Thus, defendant’s motion to suppress the trace evidence was properly denied.

## II

Defendant also challenges the admission of certain trial testimony by an expert witness. Defendant specifically argues that the challenged testimony constituted hearsay and that it was admitted in violation of his Confrontation Clause rights. We agree.

Defense counsel objected at trial on the apparent ground that the expert witness did not possess personal knowledge concerning some of the facts contained in his testimony. However,

counsel did not object to the testimony on hearsay or Confrontation Clause grounds. “An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, although the hearsay and Confrontation Clause issues were subsequently raised in defendant’s post-judgment motion for an evidentiary hearing and a new trial,<sup>1</sup> these issues are strictly unpreserved. *Id.*

Whether the admission of testimony violates a defendant’s rights under the Confrontation Clause presents a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). In general, “[w]e review a trial court’s evidentiary rulings for an abuse of discretion.” *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A trial court necessarily abuses its discretion “when it admits evidence that is inadmissible as a matter of law.” *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). However, because defendant’s arguments in this regard are strictly unpreserved, we review them for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecution offered serologist Paul Donald as an expert in the “field of serology and . . . DNA forensic testing.” Serologists Paul Donald, Michelle Marfori, and Rodney Wolfarth all performed laboratory tests related to this case,<sup>2</sup> but only Donald testified at trial. Some of Donald’s testimony was based solely on the written reports and findings of Marfori and Wolfarth. In particular, Donald testified that Wolfarth found evidence of human blood in several samples taken from defendant’s apartment and in a sample taken from a blue blanket discovered by the police. Donald then testified that Marfori tested the samples and that she concluded that the victim’s blood matched certain of the samples taken from defendant’s apartment. Lastly, Donald testified that Wolfarth compared the victim’s blood to the blood collected from the blue blanket, and that Wolfarth concluded that the samples matched.

We do not question Donald’s qualifications as an expert witness in the fields of serology and DNA testing. See MRE 702. However, we conclude that Donald’s testimony concerning Marfori’s and Wolfarth’s out-of-court findings and laboratory reports constituted hearsay that was admitted in violation of the rules of evidence and in violation of defendant’s right to confront the witnesses against him.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay evidence is generally inadmissible unless it falls within one of the specific exceptions enumerated in MRE 803 and MRE 804. MRE 802; *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Laboratory reports and findings made by out-of-court scientists are “without

---

<sup>1</sup> As noted, defendant did raise these issues in his post-verdict motion. However, belatedly raising an issue in a post-verdict motion is insufficient to properly preserve an issue that could have been raised by way of an earlier objection at trial. *People v Willis*, 1 Mich App 428, 430; 136 NW2d 723 (1965).

<sup>2</sup> Donald, Marfori, and Wolfarth all worked for the Michigan state police crime laboratory.

question, hearsay.” *Id.* Such laboratory reports and findings do not fit within the hearsay exceptions for business records and public records contained in MRE 803(6) and (8). *McDaniel, supra* at 413-414. We conclude that the portion of Donald’s testimony that described the laboratory reports and findings of the two out-of-court serologists was inadmissible hearsay. *Id.* The trial court plainly erred by admitting this testimony.

Even if the challenged testimony had fallen within one of the hearsay exceptions of MRE 803 and 804, however, its admission still would have constituted plain error in this case.

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). In *People v Lonsby*, 268 Mich App 375, 392-393; 707 NW2d 610 (2005),<sup>3</sup> Judge Saad found that a laboratory report prepared by an out-of-court scientist was testimonial hearsay within the meaning of *Crawford*. There, the in-court testimony of one scientist was offered for the purpose of introducing the laboratory report, findings, and conclusions of a different, non-testifying scientist. Judge Saad noted that because the testifying scientist had not personally performed the testing or prepared the report, the defendant was denied the opportunity to challenge by cross-examination the objectivity of the non-testifying scientist and the accuracy of the laboratory observations and methodologies. *Lonsby, supra* at 392.

Judge Saad reasoned that the non-testifying scientist’s report and notes “clearly qualify as statements that [the non-testifying scientist] would reasonably expect would be used in a *prosecutorial* manner and at trial.” *Id.* at 391 (emphasis in original). Because there was no showing that the non-testifying scientist was unavailable or that the defendant had received a prior opportunity for cross-examination, he concluded that the in-court scientist’s testimony violated the defendant’s Confrontation Clause rights. *Id.* at 393.

Similar to the introduction of the out-of-court laboratory report in *Lonsby*, the introduction in this case of the non-testifying serologists’ reports and findings through Donald’s hearsay testimony deprived defendant of the ability to confront the witnesses against him. Marfori’s and Wolfarth’s laboratory reports and findings “clearly qualif[ied] as statements that [the non-testifying serologists] would reasonably expect would be used in a *prosecutorial* manner and at trial.” *Id.* at 391 (emphasis in original). Therefore, Marfori’s and Wolfarth’s laboratory reports and findings were testimonial, and Donald’s hearsay testimony regarding the reports and findings was improper. *Id.* at 392-393. Because there was no showing that Marfori and Wolfarth were unavailable, and because defendant had not received a prior opportunity to cross-examine them, the testimonial hearsay concerning Marfori’s and Wolfarth’s laboratory

---

<sup>3</sup> We are fully aware that because the other members of the *Lonsby* panel concurred in the result only, *Lonsby* established no rule of law and is not strictly binding precedent. *Fogarty v Dep’t of Transportation*, 200 Mich App 572, 574-575; 504 NW2d 710 (1993). However, Judge Saad’s well-reasoned opinion in *Lonsby* is entirely consistent with the United States Supreme Court’s decision in *Crawford*. We therefore adopt the reasoning of *Lonsby* as our own.

reports and findings was “inadmissible as violative of the Confrontation Clause.” *Id.* at 388. The trial court plainly erred by admitting this evidence.

What remains to be determined is whether the plainly erroneous admission of this testimonial hearsay evidence affected defendant’s substantial rights. *Carines, supra* at 763. We have already concluded that an error occurred and that the error was plain. However, to avoid forfeiture under the plain-error rule, it must also be shown that the error affected the outcome of lower court proceedings. *Id.* And even then, we will generally reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

Although there were other proofs introduced at trial that were consistent with the prosecution’s theory of the case, none of this other evidence was nearly as strong as the testimonial DNA evidence that was improperly admitted through Donald’s testimony. Indeed, it appears that the improper DNA testimony was the single most condemning piece of evidence introduced against defendant in this matter. It alone persuasively established that the victim’s blood was in defendant’s apartment. Albeit in a different context, this Court has recognized the “significant possibility” that a jury might attribute preemptive or undue weight to improperly admitted DNA evidence in a murder case. *People v Coy*, 243 Mich App 283, 302-303; 620 NW2d 888 (2000). We cannot say that the jury would have convicted defendant in the absence of the improper evidence. Defendant has sufficiently demonstrated that the plainly erroneous admission of testimonial, out-of-court laboratory evidence affected the outcome of the lower court proceedings. *Carines, supra* at 763-764.

Lastly, we find that the erroneous admission of testimonial hearsay in this case affected the fairness and the integrity of defendant’s trial. *Id.* at 764. Even viewing all the evidence offered at trial as a whole, we are simply unprepared to conclude that the properly admitted evidence of defendant’s guilt was sufficient to erase or overcome the taint of the improperly admitted hearsay evidence. See *Coy, supra* at 313. Although the *Carines* plain-error rule sets a high bar for appellate review in cases of unpreserved trial error, defendant has adequately established that the plain error in this case requires reversal. *Carines, supra* at 763-764.

### III

In general, the constitutional principle of double jeopardy does not bar reprosecution after a defendant’s original conviction has been reversed on appeal. *Green v United States*, 355 US 184, 189; 78 S Ct 221; 2 L Ed 2d 199 (1957); *United States v Wilson*, 534 F2d 76, 78 (CA 6, 1976). The only exception to this rule is that double jeopardy bars reprosecution after a conviction has been reversed on the ground of “evidentiary insufficiency” or “failure of proof at trial.” *Burks v United States*, 437 US 1, 15-16; 98 S Ct 2141; 57 L Ed 2d 1 (1978). In this case, we have reversed defendant’s conviction on the basis of trial error rather than evidentiary insufficiency. Thus, the prosecution may retry defendant.

In light of our resolution of this matter, we need not address the remaining arguments raised by defendant on appeal.

Reversed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen